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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2012AP2692-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RODDEE W. DANIEL,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II,
Reversing an Order Determining the Defendant's
Competency, Entered in the Circuit Court, Kenosha County,
the Honorable Wilbur W. Warren III, Presiding

REPLY BRIEF OF THE
DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. A Postconviction Competency Hearing Should be Guided by Wis. Stat. § 971.14(4)(b) Because *Debra A.E.* Requires It.

State v. Debra A.E., 188 Wis.2d 111, 523 N.W.2d 727 (1994) requires that “In conducting any hearing the circuit court should be guided by sec. 971.14(4), STATS. 1991-92, to the extent feasible.” *Debra A.E.* at 132. To disregard the allocation of burden in Wis. Stat. § 971.14(4)(b) is to disregard the whole substance of the statute that *Debra A.E.* requires to be followed.

Wis. Stat. § 971.14(4) has four subsections, (a) through (d). Disregarding subsection (b) leaves little of Wis. Stat. § 971.14(4) to be applied at all. Subsection (a) requires that an examiner’s report be delivered to the prosecution and defense. Subsection (c) requires that if a defendant is competent, proceedings will be resumed. Subsection (d) requires that if the Defendant is not competent and not likely to become competent, the proceedings be suspended. If subsection (b) is disregarded, there is nothing left for circuit courts conducting postconviction competency hearings to be guided by. Adopting the State’s position would therefore effectively require overturning *Debra A.E.*, and there is no good reason to do so.

The State argues that Wis. Stat. § 971.14(4)(b) protects both a defendant's right not to be tried while incompetent (if he is incompetent) and his liberty interest (if he is competent).¹ The State concludes that since a liberty interest is no longer at stake, the statutory framework burdening the state ought not to apply. (Plaintiff-Respondent's Brief at 10-11). That conclusion does not logically follow from the premise. Since a defendant's liberty interest is no longer at stake, the only interest left is for a defendant not to be forced to proceed while incompetent. If anything, that observation mitigates in favor the argument presented in Section II.A. of our Brief in Chief: That either the defendant's or defense counsel's position that the defendant is incompetent should require a hearing with the burden to prove competency on the State. If a defendant's liberty interest is no longer a consideration, defense counsel's position that the defendant is incompetent does not infringe on that interest.

¹ The State also argues, without citation to authority, that postconviction competency determinations protect the State from an unwarranted expansion of the right to postconviction review.

II. The Record Demonstrates Incompetence, Not Intelligent Relinquishment of the Right to Pursue Postconviction Relief.

The State repeatedly frames Roddee's inconsistent desire to fire counsel and not pursue postconviction relief as a "fundamental right to choose whether to seek postconviction review and to choose what relief to seek if review is sought." (Plaintiff-Respondent's Brief at 10; 13-15; 21.) "Because the interest served by a decision to forego postconviction review may be personal, it may be in Daniel's best interest to accept responsibility for his crimes." (Plaintiff-Respondent's Brief at 15.) In light of the facts of this case, as demonstrable from the record, framing the issue as protecting Roddee's right to accept responsibility is perverse. To do so would be to treat the symptoms borderline retardation and schizophrenia as a rational relinquishment of his rights. Roddee has no notion of where in the legal process he is:

MR. JUREK: Roddee, can you explain for the Court what it means to appeal a conviction?

MR. DANIEL: No.

MR. JUREK: Well, what happens if you decide to appeal?

MR. DANIEL: I don't want to talk.

MR. JUREK: I understand you might not want to talk. I think it's important for this Court to know that if you don't want to appeal or if you want to fire me that you're able to do that. So what happens if you don't appeal?

MR. DANIEL: I can get charged with a crime.

MR. JUREK: You'll get charged with a crime?

MR. DANIEL: Uh-huh.

MR. JUREK: And what happens then?

MR. DANIEL: I don't want to talk.

MR. JUREK: I know you don't want to talk. We're almost done. What happens if you get charged with a crime?

MR. DANIEL: I don't want to talk.

Postconviction competency hearing at R. 149:14-15; A-App. 35-36.

... Roddee told you that Kawanis got a deal. Well, Kawanis is his co-conspirator or co-defendant in the index offense. And he asked you, "Can I get the same deal?"

Postconviction competency hearing at R. 149:134; A-App. 155.

To Judge Warren Branch 5

this is Roddee Daniel i want to plead Guilty for the murder of Capri Walker I want to plead Guilty Im admitting that I killed Capri Walker.

Roddee's letter to the circuit court after the postconviction motion hearing, R. 129; A-App. 213.

I (undersigned counsel) have met with the Mr. Daniel multiple times in person and have spoken with him over the phone on several different occasions. Throughout these conversations, Mr. Daniel has equivocated in regard to pursuing postconviction relief, at one point refusing to meet with me despite expressing a desire to do so, and otherwise oscillating between a desire to pursue relief and a desire not to pursue relief. Neither the Defendant's desire to pursue relief nor his desire to not pursue relief *were supported by any expressed reasoning, even "idiosyncratic" reasoning*, despite my employing a variety of approaches to uncover such reasoning as might exist. The Defendant has most recently indicated a desire to terminate my representation of him, and likewise has not expressed any reason in support of that desire.

Motion for a Postconviction Competency Ruling, R. 108:1; A-App. 2 (emphasis added).

In light of his demonstrable unawareness of where he is in the legal process, to frame a foreclosure on his right to postconviction relief as protecting his autonomy is perverse.

III. Competency to Pursue Postconviction Relief Does Not Follow From Competency To Stand Trial

Presuming a defendant competent to pursue postconviction relief because the defendant may have been found competent to stand trial does not make sense, because two different kinds of competency are at question. Competency is a contextualized concept. *Debra A. E.* at 124. Competency to stand trial requires that a defendant understand the proceedings and assist in his defense. Wis. Stat. § 971.13(1). Competency to pursue postconviction relief requires that a Defendant decide whether to appeal, what the objectives of the appeal are, and assist his lawyer in raising new issues and developing a factual foundation for appellate review. *Debra A.E.* at 125-126.

The State argues that because Roddee was determined competent to stand trial, “that competency determination should continue in force and effect until it is proven that Daniel is no longer competent.” (Plaintiff-Respondent’s Brief at 5.) The State cites to no binding authority, nor does the State discuss whether the persuasive authorities it cites have competency frameworks similar to Wisconsin’s.

Even if courts are to inherit presumptions based on previous competency rulings, Roddee should be presumed incompetent. His most recent competency determination prior to the postconviction competency hearing was that he was incompetent to refuse treatment and had to be committed for

the purpose of administering medication. (Order for Involuntary Medication and Treatment, included in the original Motion for Postconviction Competency Ruling, R. 108, A-App. 5; Postconviction Competency Hearing, R. 149:31-35; A-App. 52-56.) As explained below, in this case competency to refuse treatment is much more akin to postconviction competency than competency to stand trial is.

First, the determination that he was incompetent to refuse treatment was based on the same lack of awareness and follow-through that renders Roddee incapable of pursuing postconviction relief. Relative to his treatment, his treating psychiatrist testified that Roddee lacked understanding of his condition. (Postconviction motion hearing, R. 149:55-56; A-App. 76-77.) In the same way, Roddee demonstrably lacks understanding of where in the legal process he is. (See citations to the record in Section II, above.) Relative to his treatment, his treating psychiatrist testified that he would commit to taking medication, and then not follow through, and that he would make decisions in the short term and not follow through when they had long term consequences. (Postconviction motion hearing at R. 149:31-32; 41; 49; 55; A-App. 52-53; 62; 70;76.) Likewise, relative to postconviction proceedings, he oscillates between wanting representation and wanting to appeal, and wanting to fire counsel. (Motion for Postconviction Competency Ruling, R. 108, A-App. 1-7.)

Accepting or refusing treatment would require an understanding of the risks and advantages of treatment. (Order for Involuntary Medication and Treatment, included in the original Motion for Postconviction Competency Ruling, R. 108, A-App. 5.) Pursuing or foregoing postconviction relief would require understanding the risks and advantages of that choice. Both are decisions that require a degree of decision making Roddee is incapable of sustaining. (See Postconviction motion hearing at R. 149:31-32; 41; 49; 55; 108; A-App. 52-53; 62; 70;76; 129.) Aside from being more similar to the demands of seeking postconviction relief, the determination that Roddee was incompetent to refuse treatment is more recent than the determination of competency to stand trial.

“Even if Daniel could be found incompetent by the greater weight of the credible evidence submitted at the 2012 hearing, if Daniel has regained competency since that time, appointing a guardian to make decision for a now competent defendant would violate Daniel’s fundamental right to choose whether to seek postconviction relief.” (Plaintiff Respondent’s Brief at 20-21.) On one hand, the State argues that any determination from the record that the circuit court was clearly erroneous would now be stale. On the other hand, it argues that a competency to stand trial determination from 2009 should remain in effect to create a presumption of competence. The need to resolve the issue of Roddee’s

competency—and whether the circuit court’s ruling regarding it was clearly erroneous— as a subsidiary issue is discussed in Section V, below.

IV. Burdening Defense Counsel Presents an Ethical Dilemma.

In arguing that undersigned counsel has constructed ethical issues which are not present, the State advises that taking a position contrary to the Defendant’s is not unethical by pointing to no-merit procedure. “A normal attorney-client relationship, however, does not require that counsel blindly follow his client’s wishes at the expense of counsel’s candor to the court.” (Plaintiff-Respondent’s Brief at 17.) However, no-merit procedure balances “the defendant’s right to counsel *against* appellate counsel’s ethical obligations” *State v. Allen*, 2010 WI 89, ¶ 18, 328 Wis. 2d 1, 786 N.W.2d 124 (emphasis added). “For all practical purposes, the representation in which the lawyer served as the client’s zealous advocate is at an end when the no-merit report is filed.” *Allen* at ¶ 104 (concurrence of Chief Justice Abrahamson).

The State urges that “there is no reason why it should be considered ethical and necessary for counsel to inform the court of facts supporting a finding of incompetency before a hearing is held, but it considered unethical to do so at the hearing itself.” (Plaintiff-Respondent’s Brief at 17.) However, it is not necessary for counsel to inform the court of facts

supporting a finding of incompetency: Rather, “[t]here is no requirement that the attorney testify about his or her reasons for raising the issue or the opinions, perceptions, or impressions that form the basis for his or her reason to doubt the clients competence.” *Meeks*, 2003 WI 104, ¶46, 263 Wis.2d 794, 666 N.W.2d 859.

The State emphasizes the distinction between *Meeks* and the present case, in that *Meeks* concerned former counsel testifying instead of present counsel litigating a position contrary to his client’s stated position. That distinction does not mitigate the dilemma: It magnifies it. As this Court pointed out in *Meeks*, “Present counsel, not former counsel, alone is saddled with both obligations, and it is thus present counsel’s duty, as an officer of the court, to assist the court in ensuring that his or her client is competent to be tried.” *Meeks* at ¶49. The fact that present counsel is still counsel with a continuing obligation to a defendant means that litigating a position contrary to the defendant’s would place counsel in an ethically impossible situation for the reasons discussed in our Brief in Chief. Adopting the State’s position would require overturning *Meeks*.

V. This Court Should Find that the Circuit Court's Determination of Competency was Clearly Erroneous.

Once a case comes before this Court, this Court has the discretion to review any substantial and compelling issue the case presents. *In the Interest of Jamie L.*, 172 Wis. 2d 218, 232-33, 493 N.W.2d 56 (1992). The State inconsistently argues that Roddee should be presumed competent to pursue postconviction relief by virtue of a 2009 competency to stand trial determination (Plaintiff-Respondent's Brief at 12-15), that finding him incompetent on the basis of the 2012 postconviction competency hearing would be inappropriate since he might have regained competency since then (Plaintiff-Respondent's Brief at 21), and that it is in the best interest of all parties if postconviction proceedings continue with incompetent defendants. (Plaintiff-Respondent's Brief at 8-9; n.7.) The State has also framed this as a matter of Roddee's right to forego relief and accept responsibility for his crimes. (Plaintiff-Respondent's Brief at 10; 13-15; 21.) The issue of whether the circuit court's determination was clearly erroneous was fully briefed to the court of appeals, but the court of appeals did not reach the issue because it decided the case on other grounds. This Court's determination of whether the circuit court's determination of competency was clearly erroneous will resolve the substantial and compelling subsidiary issue presented by this case and obviate the need for further, redundant proceedings on the matter.

CONCLUSION

Matters raised by the State but not addressed in this Reply Brief are covered in our Brief in Chief. This Court should find that under Wisconsin law, the burden to prove incompetency cannot be shifted to a defendant or defense counsel, and that the appropriate procedure when a defendant and defense counsel disagree as to competency is to hold a hearing with the state bearing the burden of proving competency. This court should further find that the standard of review to be employed in reviewing circuit court determinations of postconviction competency should be less deferential than circuit court determinations of competency to stand trial. Finally, this court should find that the circuit court clearly erred in finding Roddee competent to pursue postconviction relief, and remand for the appointment of a guardian to make those decisions allocated to him by law.

Dated this 24th day of November, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,346 words.

Dated this 24th day of November, 2014.

Signed:

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**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of November, 2014.

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